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CYBERBULLYING 2.0: A “SCHOOLHOUSE PROBLEM” GROWS UP

“We worry about terrorists coming into our country and doing us harm. A victim of bullying walks into [her] school each day knowing [her] terrorist could strike any moment and destroy [her] wounded spirit again, and again.”¹

“If all cruel teasing led to suicide, the human race would be extinct.”²

INTRODUCTION

Megan Meier, a thirteen-year-old MySpace user, hanged herself with a belt in October 2006.³ Megan’s parents, prosecutors, and the media quickly determined that Megan’s forty-seven-year-old neighbor,⁴ Lori Drew, had convinced Megan to kill herself in an online message while pretending to be a high school boy on MySpace.⁵ Lori Drew’s actions were labeled “cyberbullying,” a term that swiftly took root in the American vernacular.⁶ Megan’s tragedy made headlines for weeks, prompting an outcry from irate Americans, many of whom retaliated against Lori Drew.⁷ Lori Drew and her family received death threats and a brick through their kitchen window, photos of their home spread across the Internet, Lori’s voicemail was hacked, and disturbing Web sites were created by others using her name.⁸ In the years that followed, schools began punishing their students’ online speech,⁹ states passed cyberbullying regulations,¹⁰ and the U.S. Congress is now considering the Megan Meier Cyberbullying Prevention

1. BULLY POLICE USA, <http://www.bullypolice.org/whyalaw.html> (last visited Jan. 25, 2011).

2. Victoria Kim, *A Right for Students to Be Cruel Online?*, L.A. TIMES, Dec. 13, 2009, at A1 (quoting UCLA law professor Eugene Volokh).

3. Christopher Maag, *MySpace Hoax Draws No Charges*, N.Y. TIMES, Dec. 4, 2007, at A22; Mattathias Schwartz, *Malwebolence*, N.Y. TIMES, Aug. 3, 2008, § 6 (Magazine), at 26.

4. Matthew C. Ruedy, Comment, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J.L. & TECH. 323, 323 (2008).

5. *Id.* at 323–24.

6. See Christopher Maag, *When the Bullies Turned Faceless*, N.Y. TIMES, Dec. 16, 2007, § 9 (Magazine), at 9.

7. Schwartz, *supra* note 3, at 26.

8. *Id.*

9. See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 290 (3d Cir. 2010), *vacated en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

10. See Ruedy, *supra* note 4, at 335–39.

Act (the Cyberbullying Act).¹¹ This bill presents a paradox: a future victim like Lori Drew will be protected, but a future victim like Megan Meier will not.

The term “cyberbullying” is commonly used to describe acts of children harassing and threatening each other online.¹² While schools may debatably punish this child-versus-child scenario while the students are on campus,¹³ the Supreme Court has not granted schools carte blanche to punish off-campus student speech.¹⁴ This deficiency, when combined with Internet anonymity¹⁵ and harassment by adults,¹⁶ renders school-based punishments useless in many scenarios. Furthermore, cyberbullying is not rare—studies show that between fifty and seventy-five percent of teens have been bullied online, while only ten percent have reported this problem to an adult.¹⁷

Recently, many states have incorporated cyberbullying into their state bullying legislation, often by requiring public schools to enforce traditional bullying punishments when students are using electronic communications to bully each other.¹⁸ Some states require that schools report this bullying to local law enforcement,¹⁹ and various other states have made cyberbullying a crime.²⁰ In addition to the

11. See Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

12. See *What Is Cyberbullying Exactly?*, STOP CYBERBULLYING.ORG, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Jan. 25, 2011).

13. See generally Todd D. Erb, Comment, *A Case for Strengthening School District Jurisdiction to Punish Off-Campus Incidents of Cyberbullying*, 40 ARIZ. ST. L.J. 257 (2008).

14. See *Morse v. Frederick*, 551 U.S. 393, 401 (2007). The Supreme Court in *Morse* stated, “Under these circumstances, we agree with the superintendent that [a student] cannot “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.” There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents but not on *these facts*. *Id.* (emphasis added) (citations omitted). In *Morse*, a high school student was suspended for unfurling a large banner that stated “BONG HiTS 4 JESUS” while standing across the street from his school at a school-sanctioned, school-supervised event held during school hours. *Id.* at 397, 400–01.

15. See Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Online Speech*, 18 COMM. LAW. 3, 3 (2000); Jodi L. Whitaker & Brad J. Bushman, *Online Dangers: Keeping Children and Adolescents Safe*, 66 WASH. & LEE L. REV. 1053, 1061 (2009).

16. See generally Sarah Castle, Comment, *Cyberbullying on Trial: The Computer Fraud and Abuse Act and United States v. Drew*, 17 J.L. & POL’Y 579 (2009).

17. See *Half of Teens Cyber Bullied*, CONNECT WITH KIDS.COM (Dec. 23, 2009), http://www.connectwithkids.com/tipsheet/2009/469_dec23/thisweek/091223_bullied.shtml; Tara Parker-Pope, *Parents Often Unaware of Cyber-Bullying*, N.Y. TIMES WELL BLOG (Oct. 3, 2008, 10:41 AM), <http://well.blogs.nytimes.com/2008/10/03/parents-often-unaware-of-cyber-bullying/>.

18. See *Cyberbullying*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://beta.ncsl.org/default.aspx?tabid=12903> (last visited Jan. 25, 2011).

19. See, e.g., MO. REV. STAT. § 160.775 (2010); WASH. REV. CODE § 28A.300.285(5) (2006 & Supp. 2010).

20. See, e.g., N.C. GEN. STAT. § 14-458.1(a) (Supp. 2009).

recent rise in state legislation to confront cyberbullying, U.S. Representative Linda Sanchez of California has proposed the Cyberbullying Act,²¹ a bill that would make cyberbullying a federal crime.²² The bill proposes fines for cyberbullying, as well as a prison sentence of up to two years.²³

Due to the recent increase in Internet accessibility, especially through difficult-to-monitor wireless Internet and mobile phone web browsers, neither school- nor state-based regulations adequately combat cyberbullying. These school- and state-based regulations ignore fundamental and complex issues, including Internet anonymity, harassment by non-students, state jurisdictional questions, Internet jurisdictional questions, and Supreme Court decisions that have not expressly allowed schools to punish off-campus student speech. Part II of this Comment explores the background and legislative history of cyberbullying, schools' abilities to punish off-campus speech, and the federal government's ability to restrict public expression.²⁴ Part III argues that federal cyberbullying legislation is needed in light of both state- and school-based enforcement challenges, and federal cyberbullying legislation must be both content neutral and the least restrictive means of regulating the online transmission of true threats.²⁵ Part III also examines the Cyberbullying Act, concludes that it is overbroad, and argues that its goals could be achieved in a constitutional manner by adding two amendments to the federal crime of stalking.²⁶

II. BACKGROUND

In his book, *Chaos: Making a New Science*, author James Gleick argued that what humans see as unpredictable chaos is actually very ordered, and this order is determined based on the initial conditions of a series of events.²⁷ The anonymity of the Internet was its "initial condition" that eventually allowed for cyberbullying. The creation of services like Internet Explorer and Netscape—free alternatives to America Online's software—meant that a computer, modem, and

21. David Kravets, *Cyberbully Bill Gets Chilly Reception*, WIRED THREAT LEVEL BLOG (Sept. 30, 2009, 6:37 PM), <http://www.wired.com/threatlevel/2009/09/cyberbullyingbill/>.

22. *Id.*

23. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 3(a) (2009).

24. *See infra* notes 27–207 and accompanying text.

25. *See infra* notes 208–302 and accompanying text.

26. *See infra* notes 303–09 and accompanying text. This Comment does not provide an in-depth analysis of whether such a revision fits within congressional power under the Commerce Clause.

27. JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* 15 (1987).

phone jack became the only requirements to connect to the Internet.²⁸ Internet users were granted the ability to go online anonymously without identifying their legal names or providing any form of payment that would force identification.²⁹ Unlocked wireless Internet routers created the final layer of anonymity, allowing people to access the Internet via their neighbor's or a business's Internet connection without identifying themselves as the owners of that Internet connection.³⁰ Pedophiles, hackers, and music thieves found refuge in this anonymity.³¹

These developments allowed Internet users to both receive and transmit data anonymously.³² This was a major departure from the real world because, "[a]lthough speakers occasionally remain anonymous in the real world, those who insist on speaking anonymously in public settings are aberrations: the terrorist in a balaclava; the racist hidden by a white hood In cyberspace, by contrast, it is commonplace to speak without disclosing one's true name."³³ This anonymity has given Internet users uninhibited confidence to voice unpopular, irresponsible, or slanderous statements.³⁴ Ultimately, the Internet's initial conditions of free use, widespread accessibility, and anonymity led to its wildfire growth, establishing a massive audience to receive these anonymously expressed viewpoints.³⁵

The story of Megan Meier and Lori Drew spawned from Internet anonymity. Megan Meier, a thirteen-year-old student from Missouri, became friends on MySpace with a teenage boy known to her as Josh Evans, who eventually convinced her that he liked her.³⁶ The two carried on an exclusively Internet-based relationship in which Megan

28. See Harry McCracken, *20 Years of AOL Annoyances and Foul-Ups*, PC WORLD (Apr. 28, 2009, 8:00 PM), http://www.pcworld.com/article/163935/20_years_of_aol_annoyances_and_fouldups.html.

29. Barbara Kiviat, *Driver's Licenses for the Internet*, THE CURIOUS CAPITALIST (Jan. 30, 2010, 5:16 AM), <http://curiouscapitalist.blogs.time.com/2010/01/20/drivers-licenses-for-the-Internet/>.

30. See Rob Ashwell, *The Wireless Gateways to Cybercrime*, THE GUARDIAN, May 22, 2008, at 3.

31. *Id.* See also Enigmax, *Hackers Undermine Piracy Evidence with Hadopi Router*, TORRENTFREAK BLOG (July 9, 2009), <http://www.torrentfreak.com/hackers-undermine-piracy-evidence-with-hadopi-router-090709>.

32. Enigmax, *supra* note 31.

33. Smith, *supra* note 15, at 4.

34. See *id.* at 3. Adding further complications, 14% of young adults claim to have been impersonated online. See A THIN LINE, http://www.athinline.org/content/statistics/16/full_hero_image.jpg?1259780075 (last visited Jan. 25, 2011).

35. See Smith, *supra* note 15, at 3–4.

36. Ruedy, *supra* note 4, at 323–24.

confided in Josh and Josh cultivated Megan's trust.³⁷ The situation went sour when Josh suddenly told Megan that he hated her, and many other MySpace users joined in the bashing of Megan as they witnessed the relationship collapse.³⁸ Megan was called a "liar" and a "fat whore,"³⁹ and Josh informed Megan that "the world would be a better place without [her]."⁴⁰ Megan told Josh, "You're the kind of boy a girl would kill herself over," and proceeded to hang herself with a belt.⁴¹

In reality, Josh Evans was Lori Drew's online pseudonym.⁴² Lori Drew was forty-seven years old, lived on Megan's street, and was the mother of one of Megan's friends.⁴³ Lori Drew, operating under the pseudonym of Josh Evans, was accused of harassing Megan Meier to the point of suicide.⁴⁴ However, before she was even charged with a crime, Lori discovered the true magnitude of the cyberharrasment world. The Drew family's e-mail addresses, phone numbers, and other personal information spread across the Internet.⁴⁵ With this information available, the Drew family received death threats and a brick through their kitchen window.⁴⁶ Someone changed Lori's cell phone voicemail greeting to "I did it for the lulz"⁴⁷ and someone posted online a blog titled *Megan Had It Coming*.⁴⁸ The blog became national news, calling the deceased Megan Meier "fat" and a "drama queen," and the author of the blog falsely identified himself as Lori Drew.⁴⁹ Some time later, it was discovered that the blog's author was actually Jason Fortuny, a well-known hacker with no ties to Lori Drew or Megan Meier.⁵⁰

37. *Id.*

38. Maag, *supra* note 6, at 9.

39. *Id.*

40. Shira Auerbach, Note, *Screening Out Cyberbullies: Remedies for Victims on the Internet Playground*, 30 CARDOZO L. REV. 1641, 1641 n.4 (2009) ("The world would be a better place without you in it.").

41. Jennifer Steinhauer, *Arguments in Case Involving Net and Suicide*, N.Y. TIMES, Nov. 20, 2008, at A26. *See also* Schwartz, *supra* note 3, at 26 ("[Megan] hanged herself with a belt after receiving cruel messages from a boy she'd been flirting with on MySpace.").

42. *See* Steinhauer, *supra* note 41, at A26.

43. Ruedy, *supra* note 4, at 324.

44. *See* Steinhauer, *supra* note 41, at A26.

45. Schwartz, *supra* note 3, at 26.

46. *Id.*

47. *Id.* Lulz is defined as "[a] corruption of 'LOL' . . . the joy of disrupting another's emotional equilibrium." *Id.*

48. *Id.*

49. *Id.* at 26-27.

50. *Id.* Mr. Fortuny informed the New York Times that he authored the *Megan Had It Coming* Web site. *Id.* at 27. He reasoned, "What's [anyone going to] sue me for? . . . Leading on confused people? Why don't people fact-check who this stuff is coming from? Why do they

Prosecutors never found adequate evidence to press criminal charges against Lori Drew for harassment, stalking, or child endangerment.⁵¹ The prosecuting attorney stated, “[Lori Drew’s] purpose was never to cause [Megan] emotional harassment.”⁵² Lori Drew was charged with “accessing a computer involved in interstate or foreign communication without authorization or in excess of authorization to obtain information in furtherance of the tort of intentional infliction of emotional distress,” although a jury found her not guilty.⁵³ The same jury did, however, find Lori guilty on three misdemeanor counts of violating the Computer Fraud and Abuse Act, essentially a crime of violating MySpace’s terms of service.⁵⁴ This verdict was widely criticized⁵⁵ and was overturned when the district court granted Drew’s motion to set aside the jury’s verdict.⁵⁶

A. States and Schools Begin Punishing Online Speech

Ron Meier, Megan Meier’s father, stated that he was “furious and heartbroken” to hear that no criminal charges would stand against Lori Drew.⁵⁷ Others agreed⁵⁸ and created anti-cyberbullying organizations like Bully Police USA⁵⁹ and STOP Cyberbullying⁶⁰ to promote cyberbullying education and legislative reform.⁶¹

assume it’s true?” *Id.* No charges were filed against Mr. Fortuny. *Id.* Those who now visit the *Megan Had It Coming* blog find a non-functional link to a YouTube video titled “Megan Got Rickrolled.” See *The Final Story*, MEGAN HAD IT COMING (Dec. 9, 2007, 9:26 PM), <http://meganhaditcoming.blogspot.com/2007/12/final-story.html>.

51. See Maag, *supra* note 6, at A22.

52. *Id.*

53. *United States v. Drew*, 259 F.R.D. 449, 453 (C.D. Cal. 2009).

54. *Id.* at 452–53, 461.

55. See, e.g., Brian Stelter, *Guilty Verdict in Cyberbullying Case Provokes Many Questions over Online Identity*, N.Y. TIMES, Nov. 28, 2008, at A28; William Tasch, “MySpace Mom” Asks Court Not to Stretch Federal Crime Beyond Congress’ Intent, 14 PUB. INT. L. REP. 172 (2009); Ryan Patrick Murray, Comment, *Myspace-ing Is Not a Crime: Why Breaching Terms of Service Agreements Should Not Implicate the Computer Fraud and Abuse Act*, 29 LOY. L.A. ENT. L. REV. 475 (2008).

56. See *Drew*, 259 F.R.D. at 468.

57. Maag, *supra* note 6, at A22.

58. See Sarah Jameson, Comment, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 COMM.LAW CONSPICUOUS 231, 231–32 (2008) (“The local and national television news and talk radio shows broadcast the story, and bloggers wrote about it Some wanted legislation; others wanted blood.”).

59. BULLY POLICE USA, *supra* note 1.

60. STOP CYBERBULLYING, <http://www.stopcyberbullying.org> (last visited Jan. 25, 2011).

61. BULLY POLICE USA, *supra* note 1. MTV took a less orthodox approach, offering \$10,000 to the user who suggested the most helpful way to end cyberbullying. See *Redraw the Line Challenge*, MTV’s A THIN LINE, <http://www.athinline.org/challenge> (last visited Jan. 25, 2011).

In response to the Megan Meier incident and other instances when cyberbullying victims committed suicide,⁶² public school administrators throughout the country began to punish their students for off-campus Internet speech.⁶³ One school suspended an eighth-grade student for uploading a video to YouTube.⁶⁴ This video depicted several eighth-grade students insulting one of their peers, calling her “spoiled,” a “brat,” and a “slut.”⁶⁵ The video was filmed and uploaded off campus, prompting an onslaught of derogatory text messages directed at the victim.⁶⁶ The offender appealed her suspension, and a federal court in Los Angeles held that this school’s punishment violated the student’s First Amendment rights.⁶⁷ Other schools have also punished off-campus electronic communication: one school punished a student for e-mailing a “degrading top-ten list” which rated his classmates,⁶⁸ another school punished a student who made a fake obituary Web site while off campus,⁶⁹ and another school punished a student for an article posted on his personal Web site while off campus.⁷⁰ A school in Seattle, Washington suspended between twenty and thirty students for joining a club on Facebook that spoke negatively about a classmate.⁷¹

Coinciding with this influx of punishment for cyber speech, various courts began cracking the venerable wall of Internet anonymity. A trial court in New York ordered Google (the owner of the blog *Blogger*)⁷² to expose the identity of Rosemary Port, the famous—though previously anonymous—author of the *Skanks in NYC* blog, after a model sued the anonymous blogger for calling her a “ho” and a “skank.”⁷³ Similarly, the Circuit Court of Cook County, Illinois, or-

62. See Susan Donaldson James, *Immigrant Teen Taunted by Cyberbullies Hangs Herself*, ABCNEWS.COM (Jan. 26, 2010), <http://abcnews.go.com/print?id=9660938>.

63. Matthew Schiffhauer, *Uncertainty at the “Outer Boundaries” of the First Amendment: Extending the Arm of School Authority Beyond the Schoolhouse Gate into Cyberspace*, 24 ST. JOHN’S J. LEGAL COMMENT. 731 (2010).

64. Kim, *supra* note 2, at A1.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Killion v. Franklin Reg’l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001).

69. *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000).

70. *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998).

71. Elisa Hahn, *Dozens of Students Suspended for Facebook Cyberbullying*, NORTH WEST CABLE NEWS (Jan. 14, 2010, 11:39 PM), <http://www.nwcn.com/news/washington/More-than-20-students-suspended-for-FB-cyberbullying-81629692.html>.

72. BLOGGER: ABOUT US, <http://www.blogger.com/about> (last visited Jan. 25, 2011).

73. See George Rush, *Blogger Sez It’s Yer (H)Own Fault*, N.Y. DAILY NEWS, Aug. 23, 2009, at 11.

dered a local newspaper's Web host to identify an anonymous commenter who posted on the newspaper's Web site.⁷⁴

Critics were quick to attack these punishments and publicized exposures.⁷⁵ Northwestern University law professor Martin Redish stated, "[An Internet poster] should be allowed anonymity unless [he or she is] threatening a crime or really obviously defaming someone."⁷⁶ Other critics argued that schools should be "informally involved" with cyberbullying prevention, but any attempt to define "disruptive behavior" would be a slippery slope,⁷⁷ potentially punishing everything from heated online disagreements to old-fashioned "trolling"⁷⁸—the process of annoying other Internet users for no good reason.⁷⁹ Some also maintained that punishing students for incidents similar to the video on YouTube overstepped constitutional limits on *where* schools may punish behavior and *what* speech schools may punish.⁸⁰ Ultimately, critics maintain that "[s]tudents . . . have a [First] Amendment right to be nasty in cyberspace."⁸¹

States began passing anti-cyberbullying legislation to establish uniformity regarding the types of electronic communication that schools may punish, and since the Megan Meier tragedy, thirty states have amended their statutes to cover online harassment.⁸² Six of these

74. See Jamie Sotonoff, *Judge: Reveal Who Posted Nasty Comment*, DAILY HERALD, Oct. 2, 2009, at 19. This court ordered disclosure as part of pre-suit discovery. *Id.* Lisa Stone, village trustee of Buffalo Grove, Illinois, filed a petition for pre-suit discovery after the Web site commenter posted negative comments about her teenage son. *Id.*

75. *Id.* See also James Tucker, *Free Speech and "Cyber-Bullying,"* ACLU BLOG OF RIGHTS (Jan. 16, 2008, 10:29 AM), <http://www.aclu.org/2008/01/16/free-speech-and-cyber-bullying/>. Rosemary Port sued Google for exposing her identity. See Paul Thompson, *Blogger Who Called Vogue Model a 'Skank' Sues Google for \$15 Million for Unmasking Her*, MAIL ONLINE (Aug. 25, 2009, 1:34 PM), <http://www.dailymail.co.uk/news/worldnews/article-1207669/Rosemary-Port-sues-Google-15million-Liskula-Cohen-skank-blog-unmasking.html>. Likewise, both the Electronic Frontier Foundation and the Media Freedom and Information Access Practicum at Yale Law School filed amicus briefs with the Illinois Court of Appeals in an attempt to stop the identification of the Illinois newspaper's online commenter. See Dissent, *EFF to Court: Block Unmasking of Anonymous Online Critic*, POGO WAS RIGHT.ORG (Mar. 15, 2010), <http://www.pogowasright.org/?p=8330#more-8330>.

76. Sotonoff, *supra* note 74, at 19.

77. Kathleen Fitzgerald, *Bills to Curb Cyber-Bullying Raise Free-Speech Concerns*, STUDENT PRESS LAW CENTER (Feb. 4, 2008), <http://www.splc.org/news/newsflash.asp?id=1679>.

78. Giving further credence to the evolution of the Internet, "old-fashioned" (circa the late 1980s) trolling, or simply annoying others online, has evolved into modern trolling—macro-scale organized humiliation of others—a change "from [an] ironic solo skit to vicious group hunt." Schwartz, *supra* note 3, at 26.

79. See *id.* at 28–29.

80. See Kim, *supra* note 2, at A1; Tucker, *supra* note 75.

81. Kim, *supra* note 2, at A1.

82. See Sameer Hinduja & Justin Patchin, *State Cyberbullying Laws 1* (July 2010) (unpublished study), available at www.cyberbullying.us. Thirty states have statutes against both bullying

states use the term “cyberbullying.”⁸³ Most states have a bullying law that schools must enforce, and thirty add that harassment can also take place electronically.⁸⁴ At least three state statutes say that cyberbullying must occur on campus or at school-sponsored activities.⁸⁵

Certain states have created very specific cyberbullying statutes.⁸⁶ Iowa only punishes cyberbullying that is “based on [a victim’s] actual or perceived trait or characteristic . . . which creates an objectively hostile school environment.”⁸⁷ The statute offers a list of characteristics that qualify, “includ[ing], but . . . not limited to age, color, creed, national origin, race, religion, marital status, sex, sexual orientation, gender identity, physical attributes, physical or mental ability or disability, ancestry, political party preference, political belief, socioeconomic status, or familial status.”⁸⁸

A few states have passed cyberbullying legislation that requires both police involvement and criminal punishments.⁸⁹ North Carolina’s statute, which makes cyberbullying a criminal misdemeanor, provides that punishable cyberbullying includes certain instances of online impersonation, soliciting others to post “private, personal, or sexual” content relating to minors, posting or stealing data about a minor with the intent of harassment, repeatedly using a computer to harass a minor, and various other offenses.⁹⁰ The statute states that any person over eighteen years old who violates this law may face six

and online harassment. As of July 2010, Colorado, Hawaii, Indiana, Michigan, Montana, North Dakota, and South Dakota still do not have bullying statutes, let alone electronic harassment statutes.

83. *See id.*

84. *Id.*

85. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 18.

86. *See id.*

87. IOWA CODE § 280.28(2)(b) (1996 & Supp. 2010).

88. IOWA CODE § 280.28(2)(c).

89. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 18.

90. N.C. GEN. STAT. § 14-458.1(a) (Supp. 2009). Under the North Carolina statute, punishable cyberbullying occurs

[when] any person [uses] a computer or computer network to do any of the following:

(1) With the intent to intimidate or torment a minor: a. Build a fake profile or Web site; b. Pose as a minor in: 1. An Internet chat room; 2. An electronic mail message; or 3. An instant message; c. Follow a minor online or into an Internet chat room; or d. Post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor.

(2) With the intent to intimidate or torment a minor or the minor’s parent or guardian: a. Post a real or doctored image of a minor on the Internet; b. Access, alter, or erase any computer network, computer data, computer program, or computer software, including breaking into a password protected account or stealing or otherwise accessing passwords; or c. Use a computer system for repeated, continuing, or sustained electronic communications, including electronic mail or other transmissions, to a minor.

or more months imprisonment, and any person under eighteen years old who violates the statute may face from thirty days to six months of imprisonment.⁹¹ Two parts of this statute require a *mens rea* of “intent,”⁹² one part requires “purpose,”⁹³ and other sections—those that criminalize planting statements online that provoke third-party harassment of a minor and registering minors for pornographic Web sites, junk e-mail, and instant messages—have no specified *mens rea*.⁹⁴ Moreover, registering a minor for junk e-mail and instant messages is only a crime if it results in “intimidation or torment of the minor.”⁹⁵

Missouri, the home state of Megan Meier and Lori Drew, updated its harassment statute to confront cyberbullying in 2008.⁹⁶ Missouri’s statute requires that public schools inform law enforcement when student harassment occurs, including when a student “knowingly frightens, intimidates, or causes emotional distress to another [student]” online or by phone.⁹⁷ Prosecutors may then press criminal charges against the cyberbully.⁹⁸ Most importantly, Missouri’s legislation is not limited to schools.⁹⁹ In the first three months following the signing of this legislation, Missouri officials brought cyberbullying charges

(3) Plant any statement, whether true or false, tending to provoke or that actually provokes any third party to stalk or harass a minor.

(4) Copy and disseminate, or cause to be made, an unauthorized copy of any data pertaining to a minor for the purpose of intimidating or tormenting that minor (in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network).

(5) Sign up a minor for a pornographic Internet site.

(6) Without authorization of the minor or the minor’s parent or guardian, sign up a minor for electronic mailing lists or to receive junk electronic messages and instant messages, resulting in intimidation or torment of the minor.

Id.

91. N.C. GEN. STAT. § 14-458.1(b). Minors (those under eighteen years of age) who plead guilty or are found guilty of cyberbullying may, at the court’s discretion, be placed on probation with the possibility of having their record expunged. See § 14-458.1(c); § 14-3(a)(1)–(2).

92. § 14-458.1(a)(1)–(2).

93. § 14-458.1(a)(4).

94. § 14-458.1(a)(1)–(6).

95. § 14-458.1(a)(6).

96. MO. REV. STAT. § 565.090(1), (3) (1999 & Supp. 2010); see also *Missouri: Cyberbullying Law Is Signed*, N.Y. TIMES, July 1, 2008, at A16.

97. MO. REV. STAT. § 160.261(2)(24) (referencing § 565.090). Washington State’s cyberbullying statute takes a slightly different approach from the statute in Missouri, giving Washington school administrators the *option* of making contacting police part of its official policy. WASH. REV. CODE § 28A.300.285(5) (2006).

98. MO. REV. STAT. § 565.090(2).

99. See MO. REV. STAT. §§ 565.090, 565.225. Harassment of this nature is a crime when any Missourian commits these actions, and the penalties are increased for recidivists and adults harassing minors. *Id.*

against seven individuals.¹⁰⁰ Several of these individuals faced charges for sending threats and harassment via text message, and at least one individual was charged with sending threats through e-mail.¹⁰¹ Only one case involved students quarrelling among classmates.¹⁰² Missouri officials also arrested a ninth-grade student when school administrators informed police that she created a vulgarly titled Web site to degrade one of her classmates.¹⁰³

B. *The Megan Meier Cyberbullying Prevention Act*

In the wake of these conflicting state cyberbullying punishments and the increased public interest in the problem, California Representative Linda Sanchez proposed House Bill 1966, the Megan Meier Cyberbullying Prevention Act (the Cyberbullying Act).¹⁰⁴ If it is enacted, this bill would criminalize cyberbullying and provide penalties of fines and up to two years in prison.¹⁰⁵ In an editorial defending the Cyberbullying Act, Representative Sanchez explained her logic:

Laws criminalize similar behavior when it takes place in person, but not online. In fact, we have laws criminalizing stalking, sexual harassment, identity theft and more when it takes place in person and online. All of these actions have consequences. But there is one serious online offense that has no penalty—cyberbullying. Do we not think it is as serious because it takes place in cyberspace and not face to face?¹⁰⁶

Representative Sanchez likewise discussed the lack of state action, concerns relating to the threatening of children in general, and the issue of Internet anonymity.¹⁰⁷

The Cyberbullying Act offers a finding of facts, providing a brief explanation of the type and scope of the harm caused by cyberbullying.¹⁰⁸ This finding of facts cites the high number of children who

100. Kim Zetter, *Prosecutors Charge 7 People Under New Cyberbullying Law*, WIRED THREAT LEVEL BLOG (Dec. 19, 2008, 3:38 PM), <http://www.wired.com/threatlevel/2008/12/seven-people-ch/>.

101. *Id.*

102. *Id.*

103. Kim Zetter, *Teen Arrested for Creating Website to Bully Other Teen*, WIRED THREAT LEVEL BLOG (Oct. 15, 2009, 3:07 PM), <http://www.wired.com/threatlevel/2009/10/bully/>.

104. See Kravets, *supra* note 21.

105. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 3(a) (2009).

106. Linda Sanchez, *Protecting Victims, Preserving Freedoms*, HUFFINGTON POST BLOG (May 6, 2009, 5:48 PM), http://www.huffingtonpost.com/rep-linda-sanchez/protecting-victims-preser_b_198079.html (“According to a study by the United States Secret Service, being bullied is a risk factor for perpetrators of school violence, such as the kind that was unleashed with tragic results at Columbine High School in Colorado.”).

107. *Id.*

108. H.R. 1966 § 2.

have access to the Internet, the prevalence of cyberbullying on social networking Web sites, the anonymity provided by the Internet, the emotional distress tied to online victimization, and the psychological, academic, and occasionally physical harm that results from cyberbullying.¹⁰⁹ The Cyberbullying Act also explains that “[s]ixty percent of mental health professionals who responded to [a survey] report having treated at least one patient with a problematic Internet experience in the previous five years; 54 percent of these clients were 18 years of age or younger.”¹¹⁰ Thus, the Cyberbullying Act contends that cyberbullying’s harm is both noticeable and widespread.¹¹¹

The bill proposes that one is guilty of cyberbullying if he or she “transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior.”¹¹² Thus, federally criminalized cyberbullying would be a specific intent crime. The bill defines electronic means as “including email, instant messaging, blogs, Web sites, telephones, and text messages.”¹¹³

Representative Sanchez’s bill faced a cold reception from Republicans and Democrats alike in the House Subcommittee on Crime, Terrorism, and Homeland Security.¹¹⁴ Representative Louie Gohmert stated that the Cyberbullying Act “appears to be another chapter of over-criminalization,” contending that if this legislation becomes law, “[a] good prosecutor could indict a ham sandwich.”¹¹⁵ The Subcommittee did not take further action on Sanchez’s proposal during the 111th Congress.¹¹⁶

Passing the Cyberbullying Act will be an uphill battle. Congress ignored Representative Sanchez’s previous cyberbullying bill.¹¹⁷ When Congress has enacted regulations on speech, the Supreme Court has subsequently found many of them unconstitutional.¹¹⁸ The Deleting Online Predators Act, for example, would have monitored children on the Internet and blocked them from chat rooms while at

109. *Id.* § 2(1)–(5).

110. *Id.* § 2(6).

111. *See generally id.*

112. *Id.* § 3(a).

113. *Id.*

114. Kravets, *supra* note 21.

115. *Id.*

116. *See 111th Congress H.R. 1966, BILL SUMMARY & STATUS*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.01966>: (last visited Jan. 25, 2011).

117. *See Megan Meier Cyberbullying Prevention Act*, H.R. 6123, 110th Cong. (2008).

118. *Barbara A. Sanchez, United States v. American Library Association: The Choice Between Cash and Constitutional Rights*, 38 AKRON L. REV. 463, 465–69 (2005).

school unless they were under adult supervision.¹¹⁹ The bill was never enacted.¹²⁰ The Communications Decency Act of 1996,¹²¹ the Child Pornography Prevention Act,¹²² and the Child Online Protection Act were all enacted into federal law and later found unconstitutional.¹²³ The rationale expressed by the Supreme Court in these cases largely mirrors the logic of Judge Dalzell of the U.S. District Court for the Eastern District of Pennsylvania, who wrote, "As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion."¹²⁴ Thus, Representative Sanchez will need to limit the scope of any cyberbullying legislation to preserve constitutionally protected speech.

The Cyberbullying Act does not limit itself to purely school-related issues.¹²⁵ Megan Meier's school could not have suspended or expelled Lori Drew because Lori was not a student.¹²⁶ However, recent cases have shown schools expanding their authority and punishing online student behavior occurring off campus.¹²⁷ To determine whether or not cyberbullying may be discouraged through schoolhouse punishments, one must first examine what constitutes a schoolhouse problem. One must also ask whether legislation already exists that achieves the same purposes of the Cyberbullying Act outside of school grounds.

C. *The Supreme Court Has Limited the Speech a School May Regulate*

In *Tinker v. Des Moines Independent Community School District*, several students claimed that their school had wrongfully suspended them for wearing black armbands to protest the Vietnam War.¹²⁸ The Supreme Court held that these students were within their rights to

119. Mary B. Kibble, Comment, *Fear Mongering, Filters, the Internet and the First Amendment: Why Congress Should Not Pass Legislation Similar to the Deleting Online Predators Act*, 13 ROGER WILLIAMS U. L. REV. 497, 515 (2008).

120. *Id.* at 526.

121. *Reno v. ACLU*, 521 U.S. 844, 882–83 (1997) (striking down the Communications Decency Act except as it pertains to obscene and indecent materials and acknowledging that, through the statute's severability clause, these two forms of speech may remain regulated because they are not protected by the First Amendment).

122. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253, 258 (2002).

123. *Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004) (stating that the Child Online Protection Act, 47 U.S.C. § 231, was unconstitutional because the government did not prove that the proposed regulations were the least restrictive means of reaching the government's goals).

124. *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

125. See Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

126. Schwartz, *supra* note 3, at 26.

127. See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004).

128. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504–05 (1969).

wear the armbands at school,¹²⁹ stating, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹³⁰ The Court reasoned that any speech might cause trouble or start an argument, but the Constitution protects this “hazardous freedom” as the basis for our national strength.¹³¹ Thus,

[w]hen [the student] is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . . if he does so without “materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others.¹³²

Later Supreme Court opinions refined the *Tinker* holding and applied it to a variety of situations. In *Bethel School District v. Fraser*, the Supreme Court held that, while public school students have a right to free speech at school, it is not equal to an adult’s right to free speech in other settings.¹³³ Schools may ban sexually explicit, indecent, or lewd speech¹³⁴ and may also restrict speech that a listener or reader might reasonably believe expresses the school’s own views.¹³⁵ Schools may not, however, simply “suppress ‘expressions of feelings with which they do not wish to contend’”—as seen previously in *Tinker*.¹³⁶

In 2007, the Supreme Court held in *Morse v. Frederick* that schools are allowed to ban speech and punish students for language that promotes illegal drug use or runs contrary to other school policies, even allowing a school to punish a student for acts occurring *off* the school’s physical campus.¹³⁷ In *Morse*, a student was suspended for holding a banner bearing the slogan “BONG HiTS 4 JESUS” at an off-campus, school-sponsored event that occurred during school hours.¹³⁸ The Supreme Court found both the time of the event and the school’s endorsement of this off-campus activity dispositive, stating, “There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents . . . but not on *these*

129. *Id.* at 514.

130. *Id.* at 506.

131. *Id.* at 508–09.

132. *Id.* at 512–13 (alteration in original) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

133. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

134. *Id.* at 687.

135. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

136. *Tinker*, 393 U.S. at 511 (quoting *Burnside*, 363 F.2d at 749).

137. *Morse v. Frederick*, 551 U.S. 393, 408–10 (2007).

138. *Id.* at 400–01.

facts.”¹³⁹ The Court held that a school can punish drug-promoting speech that occurs at a school-supervised and school-endorsed event held during school hours.¹⁴⁰ The Court, however, clearly stated that uncertainty remains over when a school may punish off-campus speech, and it did not attempt to resolve this confusion.¹⁴¹

The Supreme Court has expressly defined a limited realm of school authority to punish speech. The Court granted schools the right to punish speech that may substantially and materially interfere with the operation of a school.¹⁴² Sexual, lewd, drug-promoting, and vulgar speech all falls within this definition.¹⁴³ A school may also punish speech that occurs at an off-campus, school-sponsored event during school hours.¹⁴⁴

D. Ignoring the Schoolhouse Gate: The 2006 Amendments to the Federal Crime of Stalking

Interstate stalking became a federal crime in September of 1996.¹⁴⁵ The crime originally required a person to cross state lines “with the intent to injure or harass another person, and in the course of, or as a result of, such travel place[] that person in reasonable fear of . . . death . . . or serious bodily injury” either to that person or a member of his immediate family.¹⁴⁶ In recent years this statute has been modified to accommodate the realities of modern-day stalking, with the language broadened through several amendments in 2000.¹⁴⁷

This statute was again amended in 2006 with the express purpose of preventing “cyberstalking.”¹⁴⁸ Three major revisions were added. First, the statute no longer requires interstate travel, instead allowing stalking through mail or “any interactive computer service.”¹⁴⁹ Second, the statute now criminalizes placing another person “under sur-

139. *Id.* at 401 (emphasis added).

140. *Id.* (“Under these circumstances, we agree with the superintendent that Frederick cannot ‘stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.’” (emphasis added) (citation omitted)).

141. *Id.*; see also *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004).

142. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

143. *Morse v. Frederick*, 551 U.S. 393, 408–10 (2007); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

144. *Morse*, 551 U.S. at 400–01.

145. See 18 U.S.C. § 2261A (Supp. II 1994), amended by 18 U.S.C. § 2261A (2006).

146. *Id.*

147. The statute was amended in 2000 and 2006. See 18 U.S.C. § 2261A.

148. *Id.*

149. *Id.*

veillance with the intent to kill, injure, harass, or intimidate.”¹⁵⁰ Finally, Congress expanded the statute’s wording to criminalize engagement in a “course of conduct that . . . causes substantial emotional harm.”¹⁵¹

The pertinent portion of the statute now reads,

Whoever . . . with the intent . . . to place a person in another State or tribal jurisdiction, or within the special maritime and territorial jurisdiction of the United States, in reasonable fear of the death of, or serious bodily injury to [that person or that person’s family] uses the mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct that causes substantial emotional distress to that person or places that person in reasonable fear of the death of, or serious bodily injury¹⁵²

to that person or that person’s family shall be found guilty of stalking. The Supreme Court has not had occasion to decide whether these revisions adhere to the First Amendment.

E. Constitutional Limitations on Public Speech

When speech occurs outside of the school institution, any government restrictions on this speech must be analyzed under a different set of guidelines.¹⁵³ A criminal regulation of speech must be content neutral;¹⁵⁴ must only target true threats,¹⁵⁵ “fighting words,” or speech that is lewd, obscene, profane, libelous, or insulting;¹⁵⁶ and must be the least restrictive method of achieving the government’s ends.¹⁵⁷ Therefore, a cyberbullying statute must follow these constitutional strictures.

In *Chaplinsky v. New Hampshire*, the defendant was convicted of violating a state law that prohibited speaking offensive, derisive, or annoying words to another person in a street or public place.¹⁵⁸ The defendant called a public official on the street a “God damned racketeer” and “a damned fascist.”¹⁵⁹ Holding New Hampshire’s law valid, the Supreme Court stated that lewd, obscene, profane, libelous, insulting, or “fighting words”—“those which by their very utterance inflict

150. *Id.*

151. *Id.*

152. *Id.*

153. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

154. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); see also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

155. See *Virginia v. Black*, 538 U.S. 343, 359–60 (2003).

156. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

157. See *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

158. *Chaplinsky*, 315 U.S. at 569.

159. *Id.*

injury or tend to incite an immediate breach of the peace”—can constitutionally be regulated.¹⁶⁰

The Supreme Court's ruling in *Chaplinsky*, like its ruling in *Tinker*, has been explained, refined, and narrowed in subsequent opinions. In *Watts v. United States*, a speaker was convicted for threatening the President's life when at a rally he stated, "If [the government] ever make[s] me carry a rifle the first man I want to get in my sights is L.B.J."¹⁶¹ Overturning his conviction, the Court held that only true threats may be criminalized.¹⁶² The threat in *Watts* was held not to be a true threat because it was made in the political arena (where dialogue is often heated), it was expressly conditional, and it brought about no dangerous reaction from its listeners.¹⁶³ The Court in *Watts* did not define a true threat nor create a test for it.¹⁶⁴ Instead, the Court simply stated that these specific circumstances did not constitute a true threat.¹⁶⁵

Beyond counteracting threats, regulations on speech must be content neutral. In *City of Renton v. Playtime Theatres*, Playtime Theatres challenged the constitutionality of a city zoning ordinance that restricted the building and operating of adult movie theaters within one thousand feet of a residential zone, home, church, park, or school.¹⁶⁶ The Court held that the city's zoning ordinance was constitutional because it imposed only a content neutral time, place, and manner regulation.¹⁶⁷ The Court required that any ordinance of this nature must serve a substantial government interest and not unreasonably limit alternative avenues of communication.¹⁶⁸

In *R.A.V. v. City of St. Paul*¹⁶⁹ and *Virginia v. Black*,¹⁷⁰ the Supreme Court narrowed the types of threats and intimidation that may be constitutionally proscribed.¹⁷¹ The Court in *R.A.V.* held that a St. Paul, Minnesota city ordinance criminalizing the display of a symbol that "arouses anger, alarm or resentment . . . on the basis of race, color,

160. *Id.* at 572–73.

161. *Watts v. United States*, 394 U.S. 705, 706 (1969).

162. *See id.* at 708.

163. *Id.*

164. Leigh Noffsinger, Comment, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Advocacy*, 74 WASH. L. REV. 1209, 1216 (1999).

165. *Watts*, 394 U.S. at 708.

166. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 45–46 (1986).

167. *Id.* at 46.

168. *Id.* at 47.

169. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

170. *Virginia v. Black*, 538 U.S. 343 (2003).

171. *See Black*, 538 U.S. at 343; *R.A.V.*, 505 U.S. at 377.

creed, religion or gender” was facially invalid under the First Amendment.¹⁷² Justice Scalia, writing for the Court, stated that states could not constitutionally criminalize a certain type of speech (here “fighting words”) based solely on protecting certain groups (here “race, color, creed, religion or gender”).¹⁷³ The Court made it clear that “[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”¹⁷⁴ As such, the government may not regulate speech based on hostility or favoritism towards a *nonproscribable* message in the speech, a rule the city of St. Paul violated by singling out “race, color, creed, religion or gender” in its harassment statute.¹⁷⁵

In *Virginia v. Black*, the Court found a city ordinance outlawing cross burning to be constitutional, in part because the ordinance did not explicitly state a basis of protecting certain groups or people with certain characteristics.¹⁷⁶ The Supreme Court stated that true threats and intimidation may only be banned when the speaker “means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹⁷⁷ Given the nature and history of cross burning in Virginia, the court held that cross burning constituted both intimidation and a true threat.¹⁷⁸

The Supreme Court has established an additional constitutionality test for instances in which Internet speech is restricted. In both *United States v. Playboy Entertainment Group*¹⁷⁹ and *Ashcroft v. ACLU*,¹⁸⁰ the Court held that any regulation of electronic communication must be the least restrictive means of achieving the government’s goals.¹⁸¹ In *Playboy*, a federal “signal bleed” law required cable operators to either scramble or fully limit sexually explicit programming during certain hours of the day because the signal from those channels would

172. *R.A.V.*, 505 U.S. at 380, 391 (emphasis added).

173. *Id.* at 391. The Court explained,

Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use “fighting words” in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.

Id.

174. *Id.*

175. *Id.*

176. *Black*, 538 U.S. at 362.

177. *Id.* at 359.

178. *Id.* at 359–60.

179. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 814 (2000).

180. *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004).

181. *Ashcroft*, 542 U.S. at 670; *Playboy*, 529 U.S. at 814.

occasionally “bleed” onto other channels visible to children and non-subscribers.¹⁸² The Court found the statute unconstitutional, even though it was narrowly tailored to confront a small problem,¹⁸³ because the government did not show that this law was the least restrictive means of achieving the government’s ends.¹⁸⁴ The Court stated, “A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.”¹⁸⁵ In this case, the Court stated that customers could call their cable operators and have the signal bleed channels blocked, which would be a less restrictive alternative.¹⁸⁶

More recently, in *Ashcroft*, the Court used the least restrictive means test as a basis for overturning the Child Online Protection Act.¹⁸⁷ This act established fines for posting material “harmful to minors” online for commercial purposes without requiring a credit card or other “reasonable measures” of age identification.¹⁸⁸ The Court explained that the government had the burden of showing that any less restrictive alternatives would also be less effective.¹⁸⁹ In this case, a government commission found that filters are actually more effective than age verification requirements; thus, the government failed to meet its burden.¹⁹⁰

In these cases, the Supreme Court defined the parameters for when the government may regulate certain forms of public speech. Prohibitions on threatening speech are only valid when used against true threats.¹⁹¹ The government may regulate speech with content neutral time, place, and manner restrictions if they pass intermediate scrutiny.¹⁹² Speech may be regulated based on its *type*, but not based on its *content*.¹⁹³ Finally, any restrictions on electronic communication must be the least restrictive means available to protect against harmful speech.¹⁹⁴

182. *Playboy*, 529 U.S. at 806.

183. *See id.* at 816.

184. *Id.* at 827.

185. *Id.* at 824.

186. *Id.* at 816–17, 823.

187. *Ashcroft v. ACLU*, 542 U.S. 656, 666, 670 (2004).

188. *Id.* at 662.

189. *Id.* at 666.

190. *Id.* at 668.

191. *See Watts v. United States*, 394 U.S. 705, 708 (1969).

192. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986).

193. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

194. *See United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 814 (2000).

F. The Problem of Overbreadth

Even when legislation restricts constitutionally suppressible speech in a content neutral manner, the Supreme Court will occasionally strike down legislation on account of overbreadth.¹⁹⁵ The Court has stated,

[W]hen statutes regulate or proscribe speech . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing “attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.”¹⁹⁶

The overbreadth doctrine has been called “strong medicine,” as it allows citizens to challenge legislation even when their own conduct was illegal; thus the Court will apply it “only as a last resort” when the overbreadth is “substantial.”¹⁹⁷

In *United States v. Stevens*, an illustrative case on the subject of overbreadth, the Supreme Court struck down a statute that criminalized the creation, sale, and possession of depictions of animal cruelty.¹⁹⁸ This statute was primarily created to prosecute creators of “crush videos,” a type of sexual fetish video in which women viciously maim small, living animals.¹⁹⁹ This statute carried exemptions for certain depictions of cruelty (for example, videos of cruelty that carried journalistic, religious, or historical significance).²⁰⁰ In *Stevens*, the Court was asked to apply this legislation to videos of dogfighting.²⁰¹

The Court explained that, while the act of dogfighting itself is illegal in all fifty states, criminalizing “speech” that depicts dogfighting and animal cruelty generally is overbroad.²⁰² The Court stated, “[A] law

195. See, e.g., *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503–04 (1985).

196. *Gooding v. Wilson*, 405 U.S. 518, 520–21 (1972) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

197. *New York v. Ferber*, 458 U.S. 747, 769 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

198. *United States v. Stevens*, 130 S. Ct. 1577, 1582, 1592 (2010) (finding 18 U.S.C. § 48 unconstitutional).

199. *Id.* at 1598. The Court stated,

All 50 States and the District of Columbia have enacted statutes prohibiting animal cruelty. But before the enactment of [18 U.S.C.] § 48, the underlying conduct depicted in crush videos was nearly impossible to prosecute. . . . “[T]he faces of the women inflicting the torture in the material often were not shown, nor could the location of the place where the cruelty was being inflicted or the date of the activity be ascertained from the depiction.” Thus, law enforcement authorities often were not able to identify the parties responsible for the torture.

Id. (citations omitted).

200. *Id.* at 1582–83.

201. *Id.* at 1583.

202. *Id.* at 1583, 1586.

may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’”²⁰³ The Court expressed concern that this statute criminalized videos of “wounded . . . or killed” animals, which does not require cruelty and could criminalize a wide array of non-cruel conduct.²⁰⁴ Likewise, the statement that the recorded conduct needed to be illegal created concern because states criminalize a variety of actions relating to animals—ranging from endangered species protection to Washington D.C.’s blanket ban on hunting.²⁰⁵

The Court refused to rely on the canon of constitutional avoidance, stating, “We ‘will not rewrite a . . . law to conform it to constitutional requirements,’ for doing so would constitute a ‘serious invasion of the legislative domain,’ and sharply diminish Congress’s ‘incentive to draft a narrowly tailored law in the first place.’”²⁰⁶ The Court stated that to construe this legislation narrowly, as the government advocated, would require it to be rewritten, not reinterpreted.²⁰⁷ Thus, the number of possible unconstitutional applications of this law made the statute unconstitutionally broad.

III. ANALYSIS

Cyberbullying causes harm through psychological depression, damaged academic performance, and even (albeit rarely) inciting murder or suicide.²⁰⁸ Cyberbullying’s harm is not isolated to a small set of victims.²⁰⁹ It must be noted, however, that a great deal of speech can arguably cause harm, yet remains constitutionally protected.²¹⁰ As such, the question to resolve is not whether cyberbullying causes harm, but whether the government can constitutionally forbid the speech that causes this harm. To combat cyberbullying’s harm, the federal government can and should criminalize the most egregious instances of cyberbullying.

203. *Id.* at 1587 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

204. *See id.* at 1588.

205. *Id.* at 1588–89.

206. *Id.* at 1591–92 (alteration in original) (quoting *Reno v. ACLU*, 521 U.S. 844, 884 (1997)).

207. *Id.* at 1592 (“To read § 48 as the Government desires requires rewriting, not just reinterpretation.”).

208. *See* Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 2(5) (2009) (discussing the pervasiveness of harm caused by cyberbullying).

209. *See* Parker-Pope, *supra* note 17.

210. *See* Tucker, *supra* note 75 (discussing the need to protect the rights of Nazis to march in a town containing 40,000 Jewish citizens, 7,000 of whom survived death camps during the Holocaust).

In an article discussing the criminalization of online defamation, Professor Susan M. Brenner wrote,

Criminalizing speech is generally distasteful to Americans because of our deep reverence for the First Amendment; we tend to believe an uninhibited marketplace of ideas is one of the best guarantees of freedom. Freedom, however, is not inherently inconsistent with restrictions; every society necessarily outlaws behaviors that “harm” others and, in so doing, threaten the elemental fabric of social order.²¹¹

In certain situations, cyberbullying significantly harms others and thus threatens the “elemental fabric of social order.”²¹² In light of the harm presented, a federal cyberbullying regulation is needed to combat both jurisdictional discrepancies, fill in the gaps left by school discipline, account for non-student cyberbullying, and establish fair rules that account for Internet predators, Internet pranksters, and Internet victims. To be constitutional, a federal cyberbullying regulation must be content neutral,²¹³ limited to combating true threats,²¹⁴ and the least restrictive method of achieving the government’s ends.²¹⁵ The Cyberbullying Act is content neutral, but its content neutrality comes with a price: overbreadth. However, federal criminalization remains the least restrictive means available to create a uniform and enforceable prohibition against the worst instances of cyberbullying. This federal crime already exists, and it is called cyberstalking.

*A. The Cyberbullying Act and the Cyberstalking Statute
Are Content Neutral*

First, any constitutional cyberbullying legislation must be content neutral. Under the Court’s decisions in *R.A.V. v. City of St. Paul*,²¹⁶ and *Virginia v. Black*,²¹⁷ a content neutral cyberbullying statute could criminalize certain *types* of speech, but not content.²¹⁸ Because fighting words, intimidation, obscenities, and defamation all qualify as types of speech that may be constitutionally regulated, the Supreme Court has already decided that certain online speech may be limited

211. Susan W. Brenner, *Should Online Defamation Be Criminalized?*, 76 MISS. L.J. 705, 706–07 (2007).

212. *Id.* at 707.

213. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); see also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986).

214. See *Virginia v. Black*, 538 U.S. 343, 359 (2003).

215. See *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

216. *R.A.V.*, 505 U.S. at 382.

217. *Black*, 538 U.S. at 362.

218. See *Black*, 538 U.S. at 363; *R.A.V.*, 505 U.S. at 388.

by statute.²¹⁹ However, as regulation of speech becomes more specific, these regulations may only be justified if their “basis . . . consists entirely of the very reason the entire class of speech is proscribable.”²²⁰

A content neutral cyberbullying statute may not be based on hostility or favoritism towards any nonproscribable message.²²¹ In light of *St. Paul’s* anti-cross-burning statute being found unconstitutional in *R.A.V.* because it specifically stated that its purpose was to prohibit symbols that arouse anger based on “race, color, creed, religion or gender,”²²² and Virginia’s anti-cross-burning statute being upheld specifically *because* it did not mention any protected faction of people,²²³ a cyberbullying statute must not single out certain groups of victims based on their traits and characteristics.²²⁴ For example, Iowa’s legislation explicitly protects students from cyberbullying based on their “actual or perceived traits” and then lists a series of traits, similar to the city of *St. Paul’s* inclusion of protected groups in its unconstitutional statute.²²⁵ For this reason, a federal regulation similar to Iowa’s²²⁶ would likely be found unconstitutional. The Cyberbullying Act does not prohibit cyberbullying based on traits of the cyberbullying victim but rather based on the nature of the communication.²²⁷ Cyberbullying is defined as transmitting a message “with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior.”²²⁸ No specific groups or particular types of speech are singled out for special protection, making the legislation content neutral.²²⁹

219. *See Black*, 538 U.S. at 360 (“Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 301–02 (1964) (“The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (stating that obscenities may be proscribed and that “‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” may be proscribed).

220. *Black*, 538 U.S. at 382 (quoting *R.A.V.*, 505 U.S. at 388).

221. *See R.A.V.*, 505 U.S. at 393.

222. *Id.* at 391.

223. *Black*, 538 U.S. at 362.

224. *See id.*; *R.A.V.*, 505 U.S. at 388.

225. *See R.A.V.*, 505 U.S. at 380.

226. IOWA CODE § 280.28 (Supp. 2010).

227. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 3(a) (2009).

228. *Id.*

229. *See Black*, 538 U.S. at 362.

The current federal crime of cyberstalking is likewise content neutral for the same reasons that the Cyberbullying Act is content neutral. This statute does not prohibit cyberstalking based on traits of the cyberstalking victim but rather based on the nature of the communication and the intent of the perpetrator.²³⁰ Like the Cyberbullying Act, this statute protects no specific groups, nor are any viewpoints discriminated against, and so the statute circumvents the Supreme Court's concerns in both *R.A.V.*²³¹ and *Black*.²³²

Both the Cyberbullying Act and the federal cyberstalking statute are content neutral on their face. They do not single out certain types of electronic viewpoints while ignoring others, nor do they only protect certain groups of victims. The Cyberbullying Act's wording, while vague, is an attempt to regulate cyberbullying in a content neutral manner. The federal cyberstalking statute achieves the same ends in a more detailed fashion.

B. The Cyberbullying Act Is Overly Broad and Would Likely Be Struck Down for Prohibiting Constitutionally Protected Speech, While the Cyberstalking Statute Is Narrowly Tailored to Speech that May Be Prohibited

Any threatening or intimidating speech that is regulated by cyberbullying legislation must constitute a true threat. The true threat requirement will be a difficult hurdle for cyberbullying legislation—or any other Internet regulation—to pass. Although the *Watts* Court stated that making truly threatening statements is not protected by the Constitution,²³³ the Supreme Court has not created a test for what constitutes a true threat.²³⁴ The Cyberbullying Act will be analyzed under *Virginia v. Black*, which found constitutional a law that proscribes language “where a speaker directs a threat to a person or group of persons with the *intent* of placing the victim in fear of bodily harm or death.”²³⁵

Although it was morally repugnant when Lori Drew told Megan Meier that “[t]he world would be a better place without [her],”²³⁶ it is difficult to argue that a reasonable person receiving that message would feel “fear of bodily harm or death.”²³⁷ In the weeks following

230. 18 U.S.C. § 2261A (2006).

231. *R.A.V.*, 505 U.S. at 388.

232. *Black*, 538 U.S. at 361–62.

233. *Watts v. United States*, 394 U.S. 705, 708 (1969).

234. Ruedy, *supra* note 4, at 341.

235. *Black*, 538 U.S. at 360 (emphasis added).

236. Stelter, *supra* note 55, at A28.

237. *Black*, 538 U.S. at 360.

Megan Meier's suicide, Lori Drew actually experienced a true threat as that term is defined in *Black*²³⁸ because multiple parties harassed Drew by spreading her address, phone numbers, and satellite images of her house across the Internet, as well as calling her with death threats and throwing a brick into her kitchen.²³⁹ The *Black* true threat standard could allow electronic messages stating, "I am going to kill you" or "I am going to hurt you" to constitute a true threat if the victim is placed in fear of imminent harm or death *and* the bully intends for the victim to feel that fear.²⁴⁰ Proponents of cyberbullying legislation must accept, however, that not all types of arguably intimidating speech can be constitutionally proscribed through legislation, especially not speech that is merely insulting or derogatory.²⁴¹

The Cyberbullying Act's regulatory scope is limited by its requisite mental state of intent. It expressly states that a punishable act of cyberbullying must be committed "with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person."²⁴² By requiring specific intent, the Cyberbullying Act would only be enforceable against intentional intimidation, as defined in *Black*.²⁴³ Not only must this intentional behavior be severe and hostile, it must also occur on more than one occasion and must occur with the purpose to coerce, intimidate, harass, or cause substantial emotional distress.²⁴⁴ In *Black*, the court defined "intimidation" as a statement of intent to commit an unlawful act of violence against a person or group of people.²⁴⁵ While this may not be the intimidation that Representative Sanchez has in mind,²⁴⁶ it is how the Court should interpret this provision based on *Black*, and given the lack of criminal authority protecting one from "emotional distress," it is likely the Court will require

238. *See id.* at 348–49.

239. Schwartz, *supra* note 3, at 26.

240. *See Black*, 538 U.S. at 359–60.

241. Other countries do not agree. On February 16, 2010, a teenager in Indonesia was sentenced to seventy-five days in prison for calling one of her romantic rivals a "pig," a "dog," and "promiscuous and overweight" on Facebook. *See Facebook Insult Leads to Conviction*, CBSNEWS.COM (Feb. 17, 2010), <http://www.cbsnews.com/stories/2010/02/17/tech/main6215149.shtml>.

242. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 3(a) (2009).

243. *Black*, 538 U.S. at 359 (explaining that true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals").

244. H.R. 1966 § 3(a).

245. *Black*, 538 U.S. at 360 ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.").

246. H.R. 1966 § 3(a).

that this emotional distress arise from truly threatening intimidation.²⁴⁷

While the threshold for proving intent with the Cyberbullying Act is high, other aspects of the bill are not clearly defined and would likely be struck down as overbroad. The Supreme Court stated that “[A] law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’”²⁴⁸ The Cyberbullying Act’s problem is exactly that. By not defining the terms “coerce,” “intimidate,” “harass,” “substantial emotional distress,” “severe,” and “hostile behavior,” this bill would grant the government massive authority to punish speech that the First Amendment protects.²⁴⁹ Troublingly, this bill would also punish speech that had no effect on the person receiving the communication, creating an inchoate offense of cyberbullying.²⁵⁰ The Supreme Court in *United States v. Stevens* made clear that it would not whittle down broad language just to make legislation constitutionally narrow, because to do so would be to intrude on the role of the legislative branch.²⁵¹ Thus, this proposed bill, while content neutral and perhaps the least restrictive means of addressing cyberbullying, would likely be struck down as overly broad.

The current cyberstalking section of the federal stalking statute is more narrow than the Cyberbullying Act, and it is directed specifically at constitutionally unprotected online speech. This federal crime of cyberstalking requires engaging in a course of conduct using electronic communication with intent “to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress,” or with intent to place a person within a “reasonable fear” of death or serious bodily injury, and to cause the victim to feel “substantial emotional distress” or a “reasonable fear” of death or serious bodily injury.²⁵² Under the statute, the victim’s fear of death or serious bodily injury mirrors the Supreme Court’s interpretation of constitutionally proscribable “intimidation” in

247. *See id.*

248. *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 443, 449 n.6 (2008)).

249. *See* Eugene Volokh, *Federal Felony to Use Blogs, the Web, Etc. to Cause Substantial Emotional Distress Through “Severe, Repeated, and Hostile” Speech?*, THE VOLOKH CONSPIRACY (Apr. 30, 2009, 4:07 PM), <http://volokh.com/posts/1241122059.shtml>. In his blog, Professor Eugene Volokh outlines six seemingly preposterous new “crimes” this legislation would authorize the Government to punish. *Id.*

250. *See* H.R. 1966. Nowhere in this bill is a requirement that someone receive this communication, nor is it required that anyone be troubled by it at all. *Id.*

251. *Stevens*, 130 S. Ct. at 1591–92.

252. 18 U.S.C. § 2261A (2006).

Black.²⁵³ Similar to the Cyberbullying Act, the context of “substantial emotional distress” in this legislation is difficult to ascertain because the term is not explained.²⁵⁴ Unlike the Cyberbullying Act, the federal crime of stalking requires the victim to actually feel substantial emotional distress, and it requires that the defendant’s intent put the victim in that mental state.²⁵⁵ Because the other terms in this stalking statute have explanations that may be found in other areas of criminal law or Supreme Court precedent, it would behoove Congress to define “substantial emotional distress” to avoid overbreadth concerns.

Thus, interpreted in light of Supreme Court precedent, the Cyberbullying Act would likely be struck down as overly broad. However, the current federal crime prohibiting cyberstalking more narrowly defines its *actus reus* and serves to protect constitutional speech.

C. *A Federal Cyberbullying Crime Is the Least Restrictive Means of Preventing Online Threats*

Finally, cyberbullying criminalization will only be constitutional if it is the least restrictive means by which the government may proscribe the behavior. The least restrictive means requirement has dismantled previous regulations of electronic communication, including the Communications Decency Act of 1996²⁵⁶ and the Child Online Protection Act.²⁵⁷ Commentators raise three principle arguments under the least restrictive means test in regard to cyberbullying legislation: (1) parents can control cyberbullying through monitoring their children’s Internet use;²⁵⁸ (2) schools can stifle cyberbullying through school-enforced punishment;²⁵⁹ and (3) state laws can adequately control and punish

253. *Virginia v. Black*, 538 U.S. 343, 360 (2003) (“Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”).

254. *See generally* H.R. 1966. The United States District Court for the Western District of Louisiana recently held that a jury had sufficient evidence of “substantial emotional distress” under 18 U.S.C. § 2261A when the government offered testimony that the victims refused to let their children play outside and slept at night in shifts. *See United States v. Clement*, No. 09-0337-01, 2010 WL 1812395, at *2 (W.D. La. May 3, 2010).

255. 18 U.S.C. § 2261A.

256. *Reno v. ACLU*, 521 U.S. 844, 882–83 (1997).

257. *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004) (upholding the trial court’s injunction).

258. Ruedy, *supra* note 4, at 330, 346.

259. Kathleen Conn, *Cyberbullying and Other Student Misuses of Technology Affecting K–12 Public Schools: Will Public School Administrators Be Held Responsible for the Consequences?*, 244 EDUC. L. REP. 479, 486 (2009) (“Parents . . . should have a reasonable expectation that schools and school personnel will respond to cyberbullying, cyberharassment, and threats communicated via technology that impede student learning equally or greater than face-to-face bullying.”).

cyberbullying.²⁶⁰ While these alternatives may be less restrictive than federal criminalization of cyberbullying, they are also less effective at achieving the government's goal of protecting cyberbullying victims. The following discussion shows that each of these alternatives is inadequate and that a federal cyberbullying statute is the first online speech restriction that can pass the least restrictive means test.

1. Parental Monitoring of Children's Online Actions Is a Less Effective Alternative to Federal Criminalization of Cyberbullying

A common belief is that parents should be held responsible for monitoring their children's Internet use to prevent them from being victimized or from cyberbullying others. Parental monitoring of children's Internet activity is a woefully inadequate solution to the problem of Internet cyberbullying. If the Cyberbullying Act is challenged in court, the Supreme Court's ruling in *United States v. Playboy* would require the government to show that parental enforcement is a less effective means of protecting children from cyberbullying than federal criminalization.²⁶¹ In *Playboy*, the Court said that parents could monitor what their children see on television, and this would be less restrictive on adults who wish to view these programs.²⁶²

Times have changed since the *Playboy* decision in 2000. The Supreme Court acknowledged the Internet's rapid growth between 1998 and 2004,²⁶³ and it should now recognize its continued growth since then. The Internet is now accessed through mobile phones, school and public libraries, electronics stores, and wireless networks that pass through walls and buildings.²⁶⁴ This is markedly different from the situation in *Playboy*, a case that only concerned televisions that were physically plugged in to cable television outlets in the home, making these sources of entertainment relatively easy to monitor.²⁶⁵ Parents cannot monitor all of their children's phone conversations, YouTube uploads, social-networking interactions, and text messages. Beyond

260. *Cyberbullying Legislation: Why Education Is Preferable to Regulation: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 2 (2009) (testimony of Berin Szoka & Adam Thierer, The Progress & Freedom Foundation) [hereinafter Szoka & Thierer].

261. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824 (2000).

262. *Id.* at 825–26.

263. *Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004).

264. Mandy Rogers, *No Strings Attached: Wireless Technology Gaining in Popularity*, QUALITY CITIES, May–June 2004, at 16, 17 (“If your wireless signal makes it out into your parking lot, all an intruder would need to do is park his or her car, turn on a laptop and connect to your network.”).

265. See *Playboy*, 529 U.S. at 807.

the relative ease with which parents can observe their home television, in *Playboy* Justice Breyer explained that parents could also call their cable company and request to have any offensive channels removed from their cable package.²⁶⁶ Parents cannot call their Internet service providers and request to have threats and harassment removed from their Internet package. It is likewise difficult to imagine that parents have the time to monitor their children's hours online, especially considering the average American spends sixty-eight hours per month on the Internet.²⁶⁷

The Supreme Court has applied the least restrictive means analysis to Internet communication. In *Ashcroft*, the Court invalidated Internet pornography regulations because parents could install filtering software that blocks online pornography from reaching children.²⁶⁸ The Court stated, "COPA [the Child Online Protection Act] presumes that parents lack the ability, not the will, to monitor what their children see. By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties."²⁶⁹ Private filtering could accomplish the same purposes as regulation; as such, the Court found filtering software to be a less restrictive alternative.²⁷⁰ But cyberbullying is different—parents likely have the *will* to stop cyberbullying, but no means exist to give parents the *ability* to stop cyberbullying. Unlike pornography filters, filtering software cannot adequately prevent cyberbullying from reaching children because it can neither analyze context (such as a friend saying "I'm going to kill you" as opposed to a stranger saying the same) nor discern Internet idioms (such as text and numeric combination words like "r4p3"—a code for "rape").²⁷¹ Furthermore, Web site administrators cannot monitor these communications due to the staff and time that would be required to screen

266. *Id.* at 841–42 (Breyer, J., dissenting).

267. *Average American Watches 153 Hours of TV & Online 68 Hours Per Month*, CLEAN CUT MEDIA (Oct. 25, 2009), <http://cleancutmedia.com/Internet/you-watch-153-hours-of-tv-online-68-hours>.

268. *Ashcroft v. ACLU*, 542 U.S. 656, 666–67, 671 (2004).

269. *Id.* at 670.

270. *Id.* at 666–70.

271. See URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=r4p3> (last visited Jan. 25, 2011). In a less grotesque example, Professor Susan Brenner, professor of criminal law and cybercrime at the University of Dayton School of Law, maintains a blog on cybercrime titled "CYB3RCRIM3." See *Fraud and Interstate Commerce*, CYB3RCRIM3, <http://cyb3rcrim3.blogspot.com/> (last visited Jan. 25, 2011).

every message. For example, Facebook cannot constantly monitor the activity of its four hundred million users.²⁷²

2. *School Punishment of Students' Online Actions Is a Less Effective Alternative to Federal Criminalization of Cyberbullying*

Speech that occurs on school property, during school hours, or at school-sponsored functions may currently be restricted in order to further legitimate government interests, provided that those restrictions are content neutral and the speech constitutes a material and substantial disruption to school activities.²⁷³ Supporters of school discipline as the means to target cyberbullies seize on the Supreme Court's holding in *Morse*, which allowed the defendant's school to punish his off-campus speech.²⁷⁴ These supporters also cite various federal appellate court decisions that have permitted schools to regulate speech that took place exclusively off campus.²⁷⁵ As more cases appear in which schools are allowed to punish off-campus speech that carries on-campus ramifications, some commentators suggest that cyberbullying is an issue best left for schools to *tinker* with.²⁷⁶ There is even alternative legislation in the House of Representatives that would grant schools additional funding to teach about cyberbullying awareness.²⁷⁷

As a threshold issue, the Supreme Court in *Morse* did not hold that schools could punish students generally for their off-campus speech.²⁷⁸ Distinguishing *Bethel School District v. Fraser*,²⁷⁹ the *Morse* Court wrote that if the student "delivered the same speech [that the Court allowed to be punished] in a public forum outside the school context, it would have been protected."²⁸⁰ Although the Supreme Court in *Morse* allowed the school to punish off-campus speech, the Court rea-

272. Statistics, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Jan. 25, 2011).

273. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969); see also *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (citing *Tinker*, 393 U.S. at 513).

274. See *Morse*, 551 U.S. at 399–401 (explaining that the Court considered the student's actions to have transpired at a school function and disregarding the fact that this school function was adjacent to, but not on, school property).

275. See, e.g., Duffy B. Trager, *New Tricks for Old Dogs: The Tinker Standard Applied to Cyber-Bullying*, 38 J.L. & EDUC. 553, 558–59 (2009).

276. See, e.g., Szoka & Thierer, *supra* note 260, at 14 (pun intended).

277. See Adolescent Web Awareness Requires Education Act, H.R. 3630, 111th Cong. (2009); Jacqui Cheng, *Two Cyberbullying Bills Duke It out in House Committee*, ARS TECHNICA (Oct. 1, 2009, 1:22 PM), <http://arstechnica.com/tech-policy/news/2009/10/two-cyberbullying-bills-duke-it-out-in-house-committee.ars>.

278. See *Morse*, 551 U.S. at 393.

279. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

280. *Morse*, 551 U.S. at 405.

soned that the speech in question occurred at a school function during school hours.²⁸¹ This holding provides no support for any school's purported jurisdiction over off-campus Facebook conversations, instant-messenger comments, and MySpace posts, provided these comments are sent at non-school-related events and during non-school hours. Additionally, it is not easy to obtain the location from which messages on the Internet are sent.²⁸²

Even if a school can determine from where a message was sent, school punishment for cyberbullying is only plausible when the bullying is "committed by kids against kids—not by adults against kids or against other adults."²⁸³ Logically, a school may not suspend, expel, or give a detention to a non-student adult.²⁸⁴ Additionally, school punishment requires that both the cyberbully and the victim are students of the same school, since a school's threats of suspension or expulsion would be of little deterrence to an adult such as Lori Drew.²⁸⁵ Those who define cyberbullying as between "a minor on both sides" suggest that when an adult becomes involved, "it is plain and simple cyber-harassment or cyberstalking. Adult cyber-harassment or cyberstalking is NEVER called cyberbullying."²⁸⁶ While this distinction makes it easier to claim that schools should resolve cyberbullying matters by extending the *Tinker* doctrine,²⁸⁷ the Megan Meier case is evidence that cyberbullying is evolving, and its definition and proposed regulations should expand accordingly.²⁸⁸ The argument that schools can punish this behavior is also misleading, as it implies that there are currently cyberbullying, cyberharrassment, or cyberstalking laws in all states. In reality, twenty states do not have such laws.²⁸⁹

281. *Id.* at 401.

282. For example, Facebook has permission to track its users' IP addresses. See *Privacy Policy*, FACEBOOK, <http://www.facebook.com/policy.php> (last visited Jan. 25, 2011). However, Facebook states, "The most Facebook can provide [in response to a subpoena] is the basic subscriber information for a particular account." *Law Enforcement and Third-Party Matters*, FACEBOOK, <http://www.facebook.com/help/?faq=17158> (last visited Jan. 25, 2011).

283. Szoka & Thierer, *supra* note 260, at 5.

284. Schools are allowed to suspend students during their final year of high school, even if they are legally eighteen-year-old adults.

285. See Schwartz, *supra* note 3, at 26 (explaining that Lori Drew was Megan Meier's forty-seven-year-old neighbor who convinced Megan to kill herself).

286. STOP CYBERBULLYING.ORG, *supra* note 12.

287. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority . . . of school officials . . . to prescribe and control conduct in the schools." (emphasis added)).

288. See Schwartz, *supra* note 3, at 26.

289. See Hinduja & Patchin, *supra* note 82, at 1.

3. *State Cyberbullying Legislation Is a Less Effective Alternative to Federal Criminalization of Cyberbullying*

Cyberbullying legislation only exists in a few states.²⁹⁰ Currently, most state cyberbullying legislation is closely related to school-based bullying legislation, while “[s]ome states say that local districts should develop cyberbullying prevention programs[,] [although those states] did not address the question of discipline.”²⁹¹ States that have expanded their public schools’ disciplinary role are subject to the same problems discussed in the previous section. Problems arise in states like Missouri, Idaho, and Washington that require schools to report incidents of cyberbullying to the police.²⁹² State police enforcement of cyberbullying legislation generates a range of problems in implementation and consistency. These problems overshadow any benefits of state police-based cyberbullying legislation.

The Internet unavoidably crosses state lines, thus creating an array of jurisdictional issues with conflicting state standards.²⁹³ For example, if a student from South Dakota (a state with no bullying or cyberbullying laws)²⁹⁴ vacations in Arkansas (a state with school-enforced cyberbullying policies)²⁹⁵ and repeatedly during this vacation sends intentionally threatening Facebook messages to an acquaintance who lives in North Carolina (a state with criminal cyberbullying policies),²⁹⁶ is this student off the hook, as he would be in South Dakota?²⁹⁷ Or is he a candidate for school-enforced “consequences,” as he would be in Arkansas?²⁹⁸ Or perhaps he is subject to possible imprisonment, as he would be under North Carolina’s cyberbullying statute.²⁹⁹

The answer to these questions would be difficult enough under a standard minimum-contacts analysis in civil litigation.³⁰⁰ Additional uncertainty arises when analyzing requisite minimum contacts in an

290. *Id.*

291. Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. TIMES, June 28, 2010, at A1.

292. *See id.*

293. Szoka & Thierer, *supra* note 260, at 9.

294. *See* Hinduja & Patchin, *supra* note 82, at 1.

295. ARK. CODE ANN. § 6-18-514 (2010).

296. N.C. GEN. STAT. § 14-458.1(a) (Supp. 2009).

297. *See* Hinduja & Patchin, *supra* note 82, at 1.

298. ARK. CODE ANN. § 6-18-514(b)(3) (2007).

299. *See* N.C. GEN. STAT. § 14-458.1, § 14-3(a)(1)–(2).

300. Analyzing which state law applies to the perpetrator in this situation would require an analysis of whether the cyberbully had sufficient minimum contacts with a forum state, in addition to traditional notions of fair play and substantial justice. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

online situation.³⁰¹ While schools obviously cannot suspend residents of other states, any state (such as North Carolina) that wishes to press criminal charges against an out-of-state cyberbully may do so.³⁰² If the purpose of cyberbullying legislation is to punish children, it should not take a civil or criminal procedure scholar to ascertain when and how punishment will be administered.

D. Abandoning the Megan Meier Cyberbullying Prevention Act and Proposing the Megan Meier Amendments to the Federal Crime of Stalking

The federal cyberstalking statute protects against the worst instances of cyberbullying in a constitutionally valid manner, but two amendments are needed to solidify the breadth and usefulness of this regulation. The first required amendment was addressed earlier in this Comment: a provision criminalizing speech that causes “substantial emotional distress” needs to define that term or risk being struck down as overly broad. The Supreme Court would likely refuse to rewrite this legislation to create a definition of “substantial emotional distress,” as such a rewrite would remove the “incentive to draft a narrowly tailored law in the first place.”³⁰³ One possible solution would be to adopt the definitions of emotional distress found in certain state statutes.³⁰⁴ Michigan, for example, defines criminally punishable emotional distress as “significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.”³⁰⁵ Michigan’s definition only defines emotional distress, so a federal crime based on substantial emotional distress should at a minimum require a higher level of trauma, perhaps by requiring medical treatment or professional counseling.

301. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). In *Zippo*, the court divides Internet contacts into three groups, each with a different level of accountability online. *Id.* at 1124. For the purposes of general and personal jurisdiction, businesses that use the Internet are present everywhere that the Internet is found. *Id.* at 1122–24. Databases, where a user simply posts information without any commerce purposes, are not subject to personal jurisdiction. *Id.* at 1124. Finally, between these two extremes, Web sites like Wikipedia that have a give and take of information have questionable jurisdiction, based largely on the level of interactivity and any commercial purposes of the Web site. *Id.*

302. See *Heath v. Alabama*, 474 U.S. 82, 87–93 (1985). It seems unlikely that a high school student understands the dual sovereignty principles of criminal law under which he or she would be prosecuted.

303. *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (quoting *Osborne v. Ohio*, 495 U.S. 103, 121 (1990)).

304. Susan W. Brenner & Megan Rehberg, “Kiddie Crime”? *The Utility of Criminal Law in Controlling Cyberbullying*, 8 FIRST AMENDMENT L. REV. 1, 19–20 (2009).

305. See *id.* (quoting MICH. COMP. LAWS § 750.411h(1)(b) (2004)).

The second required amendment to the statute addresses jurisdiction. Currently, the federal stalking statute requires that stalking be directed at “a person in another State” to qualify as a federal crime.³⁰⁶ This negates the ability to use this legislation against anyone being cyberbullied by someone within his same state. The federal stalking statute should be amended to use the Cyberbullying Act’s wording, which avoids this problem semantically. The Cyberbullying Act states that “[w]hoever transmits in interstate or foreign commerce” any cyberbullying communication would be guilty of a crime.³⁰⁷ Courts have recently held that e-mail and online communication, even when sent to someone “intrastate,” qualify as “interstate” communication because of the interstate locations of servers, networks, and other electronic portals through which these messages pass.³⁰⁸ The legislature can address the many disturbing instances of cyberbullying that occur between perpetrators and victims in the same state by rewording the federal stalking statute to require interstate communication, not a victim located in another state.³⁰⁹

Representative Sanchez could achieve the same results of her proposed Megan Meier Cyberbullying Prevention Act by instead proposing two amendments to the Cyberstalking Act that already covers a great deal of cyberbullying. These two amendments would ensure a constitutionally narrow interpretation of the federal stalking statute and provide federal jurisdiction for online harassment between residents of the same state.

IV. IMPACT

The Cyberbullying Act may not be passed by the current Congress. Nevertheless, this bill has been proposed before,³¹⁰ and other

306. 18 U.S.C. § 2261A (2006).

307. Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

308. CYB3BCRIM3, *supra* note 271. In this entry, Professor Brenner discusses *United States v. Siembida*, 604 F. Supp. 2d 589 (S.D.N.Y. 2008), in which defendants were convicted for sending e-mail within a state that passed through an out-of-state server. *Id.* at 597. The federal wire fraud statute requires “interstate” communication, and the court held that the e-mail server’s location in Pennsylvania established “interstate” communication. *Id.*

309. Some federal crimes are predicated on interstate communication, not an interstate division between the defendant and the victim. *See, e.g.*, 18 U.S.C. § 1343; 18 U.S.C. § 2251. The application of “interstate” legislation to “intrastate” activity is considered constitutional. *See, e.g.*, *Houston v. United States*, 234 U.S. 342, 351–52 (1914); *see also United States v. Kammerzell*, 7 F. Supp. 2d 1196 (D. Utah 1998), *aff’d*, 196 F.3d 1137 (10th Cir. 1999).

310. *See* Andrew M. Henderson, *High-Tech Words Do Hurt: A Modern Makeover Expands Missouri’s Harassment Law to Include Electronic Communications*, 74 MO. L. REV. 379, 394 (2009) (discussing the 2008 version of the Cyberbullying Act presented to the 110th Congress).

cyberbullying bills are also being presented before Congress.³¹¹ In the meantime, states continue to create and revamp school cyberbullying legislation, and certain states are making cyberbullying a crime.³¹² Even in states without cyberbullying legislation, many schools are punishing online speech.³¹³ The time has come for Congress to decide whether and how cyberbullying should be regulated.³¹⁴

Whether or not cyberbullying is expressly criminalized at the federal level, states will continue to pass conflicting legislation to confront this potentially interstate problem. If current trends continue, some states will require schools to punish cyberbullies, others will criminalize the practice, and others will ignore it entirely. In states with school-based cyberbully punishment, schools may require additional legislation that allows them to overcome the issue of Internet anonymity. Schools cannot punish a cyberbully operating under a pseudonym without first identifying the true offender.³¹⁵

A future victim like Megan Meier will have no protection under school-enforced cyberbullying punishments, the type of punishment that comprises the majority of states' legislation. Megan Meier was bullied by an *adult* acting under a *pseudonym*—two nearly insurmountable obstacles for school punishment. Even schools with mandates to punish cyberbullying cannot give an adult detention, nor can they force an adult out of online anonymity. Without criminalized cyberbullying, students who are harassed by adults using online pseudonyms will need to file tort suits, likely claiming intentional infliction of emotional distress.³¹⁶ Depending on the severity of the harassment, students may also be protected under the federal stalking statute, provided their harasser is located in another state.³¹⁷

With or without criminalized cyberbullying, a future cyberbully like Lori Drew who suggests that a young girl kill herself has not commit-

311. See Cheng, *supra* note 277.

312. BULLY POLICE, *supra* note 1; see also Zetter, *supra* note 103. A Missouri girl was arrested for creating a Web site and using it to offer pictures and disparaging commentary about her classmate, calling her a "slut." See Zetter, *supra* note 103.

313. See, e.g., Hahn, *supra* note 71.

314. See generally Allison E. Hayes, Note, *From Armbands to Douchebags: How Doninger v. Niehoff Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247 (2010). Hayes rightly argues that the U.S. Supreme Court must offer "a more workable standard . . . in [this] emerging area of law that has not been re-evaluated since the days of the Vietnam War." *Id.* at 289.

315. Neither can the federal or state government. But the government has an advantage over schools. Addressing anonymous cyberbullying through statute allows the use of the discovery process, while schools do not have a discovery process that would require Facebook or Google to identify an anonymous user.

316. See Castle, *supra* note 16, at 593–94.

317. See 18 U.S.C. § 2261A (2006).

ted a crime, even if the victim does in fact kill herself.³¹⁸ Furthermore, while it remains unclear what qualifies as “substantial emotional distress” under the federal stalking statute, Lori Drew still has not committed that crime because she and Megan Meier resided in the same state.³¹⁹ Additionally, schools cannot punish someone like Lori Drew, both because she is an adult and because she is hiding behind an online pseudonym. However, with or without federal legislation, a cyberbully like Lori Drew will likely face a civil claim of intentional infliction of emotional distress.³²⁰

Lori Drew, however, was also a victim of serious harassment in the months following Megan’s death.³²¹ Online malefactors seeking to harm the Drew family spread the family’s e-mail addresses, phone numbers, and satellite images of their home across the Internet.³²² Lori Drew and her family received death threats and a brick through their kitchen window.³²³ Unknown attackers infiltrated Drew’s voicemail³²⁴ and a blog titled “Megan Had It Coming” was posted online in Lori Drew’s name.³²⁵

If no federal cyberbullying legislation is passed, prosecutors will likely file a series of charges to protect a future *victim* like Lori Drew.³²⁶ Identity-theft statutes may protect a future Lori Drew in regards to the changes to her voicemail message and the Web site set up in her name.³²⁷ However, the federal identity-theft statute makes identity theft a crime only when identity is stolen for the purpose of committing other commercial crimes, and not all states have criminalized the type of non-commercial identity theft that Lori Drew suffered.³²⁸ Lori Drew would need to show that others were committing crimes while purporting to be her.

A future victim like Lori Drew could also turn to state laws that criminalize threats.³²⁹ It would be easier for prosecutors to claim that Lori Drew was threatened by the death threats she received on the phone than it would be for her to claim that she was threatened by the

318. See, e.g., *People v. Campbell*, 335 N.W.2d 27 (Mich. Ct. App. 1983).

319. See 18 U.S.C. § 2261A.

320. See Castle, *supra* note 16, at 593–94.

321. See Schwartz, *supra* note 3, at 26–27.

322. *Id.* at 26.

323. *Id.*

324. *Id.*

325. *Id.* at 26–27.

326. For a list of criminal statutes prosecutors could use, see Brenner & Rehberg, *supra* note 304, at 16–23.

327. See *id.* at 73–78.

328. *Id.*

329. See, e.g., MINN. STAT. § 609.713 (2009).

Web sites advocating violence against her, because the online threats were not made specifically against her. All of this becomes more complicated, however, by Internet anonymity.

At a minimum, Lori Drew was the victim of criminal property damage when a brick was thrown through her window.³³⁰ Prosecutors would need to decide whether the online discussions—namely the spreading of photos of the Drews' home and the family's phone numbers—carried the requisite factors to establish criminal conspiracy.³³¹

Finally, prosecutors could claim that Lori Drew was a victim of federally criminalized stalking.³³² The government would have to show that those who dissipated Lori Drew's information online, sent her death threats, and set up a Web site in her name did so with the intent "to kill, injure, harass, or intimidate, or cause[] [Lori Drew] substantial emotional distress."³³³ Given the national attention Lori Drew received, many of these communications may have come from other states, giving the federal government jurisdiction under the current federal stalking statute.³³⁴

If a cyberbullying bill similar to the Cyberbullying Act is passed, it will most likely be challenged in court.³³⁵ In its current form, the Cyberbullying Act remains unconstitutionally broad, and the Supreme Court would likely strike down certain sections, or the entire law, for overbreadth.³³⁶ Thus, an amended version of the current federal stalking statute, further narrowing the bill and allowing intrastate application, would be a favorable alternative to the Cyberbullying Act.

A hard truth remains: neither the Cyberbullying Act, nor the federal crime of stalking, protect Megan Meier. Megan Meier was not a victim of a true threat, and she will not be protected by constitutional cyberbullying or cyberstalking legislation. The Cyberbullying Act would not punish all actions that have been labeled "cyberbullying," nor could it. The Cyberbullying Act cannot criminalize students calling their peers "fat whores," nor would the proposed legislation imprison a student who tells a peer "the world would be a better place without you."³³⁷ These offenses will remain within the realm of

330. MO. REV. STAT. § 569.120 (1999).

331. See MO. REV. STAT. § 564.016 (1999 & Supp. 2010).

332. See 18 U.S.C. § 2261A (2006).

333. *Id.*

334. *Id.*

335. See Tucker, *supra* note 75.

336. See generally *United States v. Stevens*, 130 S. Ct. 1577 (2010).

337. Maag, *supra* note 6, at 9 (classmates of Megan Meier called her a "fat whore"); Steinhauer, *supra* note 41, at A26 (Josh Evans told Megan that the "world would be a better place" without her).

school policy, parental monitoring, and ongoing public education on cyberbullying.

Likewise, the federal crime of stalking does not negate the need for state cyberbullying legislation. The federal government and state governments already share concurrent jurisdiction regarding a variety of issues.³³⁸ An amended federal stalking statute, used concurrently with state cyberbullying crimes, would ensure that cyberbullies who threaten others online will be held accountable for their actions regardless of their home state.

The best option to protect a future Megan Meier lies outside of the realm of law. Most would admit that society would not be well served by imprisoning every child who sends an angry, morally repugnant e-mail, Facebook comment, or text message. Society cannot, however, ignore a massive increase in anonymous Internet hate speech. Various organizations have recognized this reality and are beginning to confront cyberbullying with much-needed information campaigns and publicity, raising awareness of cyberbullying's seriousness and tragic outcomes.³³⁹ This approach has worked before. Public awareness campaigns have taken smoking out of restaurants, turned racists into outcasts, and may have even saved the earth's ozone layer from damaging aerosol sprays. Relentlessly ostracizing those who cyberbully on the Internet may be the nation's best and only way to end non-threatening cyberbullying.³⁴⁰ A future Megan Meier may not be protected by a federal or state statute, but perhaps the general public can work together to save cyberbullying's next victim before it is too late.

V. CONCLUSION

Cyberbullying (and cyberstalking) can and should be regulated—but this regulation must be narrow. A cyberbullying statute cannot be limited to protecting certain groups—it may not specifically prohibit cyberbullying instigated due to age, race, gender, religion, socioeconomic status, or other specific classifications.³⁴¹ If a federal cyberbullying statute proscribes “intimidation,” courts will require this intimidation to place a victim in reasonable fear of bodily injury or

338. See, e.g., 28 U.S.C. §§ 1331, 1332 (2006).

339. See, e.g., *Cyberbullying*, NATIONAL CRIME PREVENTION COUNCIL, <http://www.ncpc.org/cyberbullying> (last visited Jan. 25, 2011); CYBERBULLYING—LAUGH AT IT AND YOU'RE PART OF IT, <http://yp.direct.gov.uk/cyberbullying/> (last visited Jan. 25, 2011); see also STOP BULLYING NOW!, <http://www.stopbullyingnow.hrsa.gov/kids/> (last visited Jan. 25, 2011).

340. Professor Susan Brenner suggests that some other state and federal laws may also punish certain instances of cyberbullying. Brenner & Rehberg, *supra* note 304.

341. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

death,³⁴² not in fear of being teased or having their lunch money stolen. Finally, a federal cyberbullying statute must be more effective than any other conceivable means of prohibiting cyberbullying³⁴³—more effective than parental monitoring, filtering software, school punishment, or state enforcement.

The Cyberbullying Act is overly broad, but an amended federal stalking statute would protect threatened cyberbullying victims. Federal stalking legislation is already content neutral, but it must be amended to clearly define what constitutes “substantial emotional distress” and to apply to intrastate communication transmitted through interstate commerce. This federal statute is the least restrictive means of achieving the nation’s goal of ending cyberbullying because parents and filters cannot adequately monitor the highly-accessible Internet, schools can only punish their own students while those students are within school, and state criminalization of cyberbullying alone creates a dangerous double-standard, generating confusion as to when and where cyberbullying is a criminal act.

The Internet is a Pandora’s box that cannot be closed. National laws must evolve with this new technology. Cyberbullies who threaten and harass others cannot cower behind generic claims of “free speech,” as constitutional free speech is not entirely without restrictions. The memory of Megan Meier would be well served by amending the federal stalking statute to protect the most abused cyberbullying victims. While bullying is traditionally understood as a childhood problem, the Internet provides a cloak of user anonymity, allowing children to be faced with grown-up evils at an immature age. Congress must make a grown-up decision, utilizing constitutional maturity, and protect Internet users from those who wish to abuse society’s advances in communication.

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342. *Virginia v. Black*, 538 U.S. 343 (2003).

343. *Ashcroft v. ACLU*, 542 U.S. 656, 668–70 (2004).

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